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NO. 933

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

CHINA UNION LINES, LTD.,
Petitioners

versus

A. O. ANDERSEN & CO., AMERICAN CYANAMID COMPANY, ET AL., *Respondents*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR MITSUBISHI INTERNATIONAL CORPORATION, ET AL., AS RESPONDENTS, IN OPPOSITION

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STATEMENT OF THE CASE

Mitsubishi International Corporation, et al. (persons, firms, and corporations whose names are set forth at length in Exhibits A, B and C attached to the Interlocutory Decree Determining Liability filed on September 3, 1963, by

the District Court (See R. 5146-5164) and who are hereinafter sometimes referred to as "these respondents"), innocent owners of cargo on the Chinese Freighter UNION RELIANCE (hereinafter sometimes referred to as "the freighter"), have heretofore filed their petition (docketed under No. 927) praying that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled consolidated case on July 27, 1966, insofar, but only insofar, as said judgment affirms a dismissal by the District Court of these respondents' libel against the Norwegian Tanker BEREAN (hereinafter sometimes referred to as "the tanker") and her owner, A/S A. O. Andersen & Co., and holds that vessel and her owner free of fault and liability for the collision.

However, as set forth in the last paragraph of page 7 of these respondents' petition for certiorari, these respondents heartily approve and support the judgment of the District Court (and the Findings of Fact and Conclusions of Law supporting same (R. 5115 et seq.)) and the judgment of the United States Court of Appeals for the Fifth Circuit insofar as they hold China Union Lines, Ltd. (hereinafter sometimes referred to as "opposing petitioner") and the freighter liable to such cargo owners for their damages and deny to opposing petitioner the right to limit its liability and to recover general average from cargo interests. These respondents file this brief in opposition to the petition of China Union Lines, Ltd., for certiorari for the purpose of asserting the proposition that there is ample evidence in the record to support such portion of the District Court's findings and conclusions (and those of the Fifth Circuit) and that such findings and conclusions (and those of the Fifth Circuit) are not clearly

erroneous within the meaning of *McAllister* v. U. S. 348 U.S. 19 (1954), but rather are clearly correct and in no way call for the issuance of the writ of certiorari as to such matters.

The pertinent Findings of Fact of the District Court on these points commence at page 5119 of the Record with Finding 1 and continue through Finding 9 on page 5124. Further pertinent findings commence with 27 on page 5130 and continue through 35 on page 5135. The pertinent Conclusions of Law flowing from the above are numbered 1, 2, 3 and 5 (R. 5140), with all of which conclusions these respondents concur, with the exception of that part of Conclusion 3 wherein the District Court held the freighter and her owners "solely" responsible. As set forth in their petition for certiorari, these respondents feel strongly that the District Court (as well as the Fifth Circuit) should also have held the tanker and her owner, A/S A. O. Andersen & Co., at fault and liable.

These respondents' argument will be presented in the form of counter-arguments on reasons 3, 4 and 5 set forth in the petition of opposing petitioner as "Reasons for Granting the Writ." As such these respondents will be treating matters dealt with principally on pages 5-6, 22-27 and 46-54 of the petition of opposing petitioner.

COUNTER-ARGUMENT UNDER OPPOSING PETITIONER'S REASON 3

Instead of finding, as asserted in the statement of Question 4 on page 5 and in the statement of Reason 3 on page 46 of opposing petitioner's petition, that the "primary and direct cause" of the collision was mere negligence of the ship's electrician or of other members of the crew of the freighter, the District Court actually found that fault and

negligence (with privity and knowledge) on the part of opposing petitioner caused the collision (please see Findings 28-35 appearing at R. 5130-5135 and at pp. 16-21 of Appendix D of opposing petitioner's petition). Such findings on the part of the District Court are, we respectfully submit, amply supported by the evidence. Some of such evidence is summarized below under the headings used by the Fifth Circuit (see that part of the Opinion of the Fifth Circuit appearing at p. 31 of Appendix A to opposing petitioner's petition) to list the specifications of opposing petitioner's negligence "with privity and knowledge" that "contributed to the unseaworthiness" of the freighter "and the collision."

A. HER (THE FREIGHTER'S) STEERING GEAR WAS UNSEAWORTHY

Opposing petitioner concedes at pp. 55-56 that the freighter "was wrongfully on its port side of this narrow channel at the time of collision" and thus admits violations of: (a) Rule I, Art, 18, 33 U.S.C.A. § 203, Rule I and (b) Art. 25, 33 U.S.C.A. § 210. Such rules required the freighter to make a port to port passing with the oncoming tanker. However, the cause of the freighter's violations in this respect remains in vigorous dispute, it being contended by all parties except opposing petitioner that the violations were at least contributed to by a steering casualty occurring on the freighter, as testified to by her master (R. 1527 et seq.), her third officer (R. 1708-1710) and her assistant third mate (R. 1912), the only survivors from her bridge, and as found by the District Court. On the other hand, opposing petitioner claims that the freighter sheered across the channel from her right hand side to her left hand side by reason of navigating too close to her westerly bank in the turn at Beacons 75 and 76. As to the

latter, the testimony of the master of the freighter was to the effect that the freighter was to westward of the center of the channel (R. 1527, where he said the freighter was 150 feet from the right hand Beacon 75 in the 400 foot channel) but not far enough to westward to be affected by suction (R. 3710-3711). On the other hand, Pilot Lary of the tanker testified unequivocally that the freighter passed to the westward of the ranges in the vicinity of Beacon 75 and that he saw she was in trouble there and likely to sheer, and thereafter did sheer across to her left hand bank. (See R. 3587-3591 and R. 3614 et seq. and pages 4, 6-10, and 11-14 of these respondents' petition for writ of certiorari).

These respondents respectfully submit that a reasonable conclusion from all of the evidence on this point is that, since the captain of the freighter concedes that the freighter was to westward of mid-channel in the vicinity of Beacon 75, there was good reason for the tanker's pilot to observe and conclude as aforesaid. However, in view of all of the evidence from the freighter's surviving witnesses regarding the steering casualty, the subsequent stopping of the vessel and the dropping of both of her anchors, it certainly appears likely that the District Court and the Fifth Circuit were correct in finding that a cause contributing to the sheer of the freighter (and her failure to break same) was the steering casualty rather than suction from the bank alone, as contended for by opposing petitioner. In any event, on all of the evidence, the steering casualty was at least a substantial force contributing to the sheer and the ensuing collision.

The District Court stated in its Finding 29 (R. 5131 and opposing petitioner's petition at p. 17 of Appendix D thereof) that "By reason of the extensive damage to

the entire bridge, the wheel, and that portion of the telemotor system on the bridge caused by the fire, the cause of the steering failure cannot be determined with as high a degree of certainty as is desired." But then the Court went on to say and find that the casualty resulted from a blown fuse in the electrical circuit controlling the port replenishing pump of the steering gear. There was evidence in the record, as the District Court pointed out, to support such a finding, and there was some evidence that loss of hydraulic fluid in the steering engines (which the District Court found resulted from the blown fuse) would cause the steering wheel on the bridge to lock (R. 1609). On the other hand, it may be true (as the expert, Mr. Tarabochia, testified, R. 2987, 3141) that a steering casualty so caused would not cause the telemotor wheel on the bridge to be locked in position such that it could not be turned, as the freighter's bridge witnesses testified. However, even if for any reason the finding of the Court based upon the evidence of the blown fuse be found incorrect, then the result is the same insofar as opposing petitioner is concerned because that would leave the case as one involving an unexplained steering casualty. Under the authorities set forth below, and under the evidence, petitioner would still be liable for damage to the freighter's cargo, would not be entitled to the claimed defense under the Fire Statute (46 U.S.C.A. § 182) and would not be entitled to limit its liability under the Limitation Statute (46 U.S.C.A. § 183), exactly as the District Court concluded.

The freighter's bridge testimony was to the effect that the wheel on the telemotor on the bridge was locked and could not be moved (R. 1531, 1912, 3768, 3770) and that, whereas the gyro pilot wheel could be moved, the rudder would not respond (R. 3776). The only kinds of

failure of the steering gear that would be entirely consistent with these symptoms would be something that jammed the telemotor itself, either something in the gears or in the hydraulic line between the bridge and the steering engine room or in the steering receiving equipment in the steering engine room. In any event, it is clear that such a casualty could only result from unseaworthiness of the steering gear, and, if opposing petitioner sought not to be legally charged with the consequences of such unseaworthiness, the authorities placed on it a burden to show that the unseaworthiness or failure of the steering gear was not a result of fault or negligence on the part of opposing petitioner. This opposing petitioner failed to do.

Furthermore, in view of the fact that opposing petitioner sought limitation in this proceeding, it had the further duty, under the authorities cited below, to show that any fault in the above connection was without the privity and knowledge, or the failure to exercise due diligence, of opposing petitioner itself. This burden it also failure to carry.

Among the authorities for these propositions are the following:

(1) *Griffin on Collision*, § 241, Par. (5);
(2) *The City of Camden*, 292 Fed. 93 (3 Cir. 1923);
(3) *States Steamship Company v. United States*, 259 F.2d 458 (9 Cir. 1957, modified on petitions for rehearing, 1957, as amended on denial of rehearing on limitation, August 20, 1958), certiorari denied, 358 U.S. 933, petition for rehearing denied, 359 U.S. 921;
(4) *SS HEWITT*, 284 Fed. 911 (S.D.N.Y. 1922);
(5) *The CALVERT*, 51 F.2d 494, 498 (4 Cir. 1931);
(6) *The CLEVECO*, 154 F.2d 605 (6 Cir. 1946);

(7) *Petition of Midwest Towing Company*, 203 F.Supp. 727 (E.D.Ill. 1962);

(8) *The MIAMI*, 43 F.2d 562 (E.D.N.Y. 1930);

(9) *The NEW BERNE*, 80 F.2d 244 (4 Cir. 1935);

(10) *Dexter-Carpender Coal Co. v. New York, O. & W. Ry. Co., et al.*, 50 F.2d 270 (S.D.N.Y. 1931);

(11) *Austerberry, et al. v. United States*, 169 F.2d 583 (6 Cir. 1948);

(12) *Henson v. Fidelity & Columbia Trust Co.*, 68 F.2d 144 (6 Cir. 1933), rehearing denied, 69 F.2d 778; and

(13) *New York & Cuba Mail S.S. Co. v. Continental Insurance Co. of City of New York*, 117 F. 2d 404 (2 Cir. 1941).

As to an unexplained steering casualty, under the above authorities, the shipower is under a duty to show all possible causes of the casualty and that it was not negligent in connection with any such cause. Yet no effort was made by opposing petitioner to show the possible causes of the steering casualty, it being opposing petitioner's sole theory, apparently, that no steering casualty ocurred. Mr. Tarabochia, opposing petitioner's own steering gear expert, was employed by opposing petitioner after the collision to conduct steering tests in the presence of various surveyors representing other parties (R. 2983, 3125). Instead of advising Mr. Tarabochia of the facts and symptoms experienced at the time of the steering casualty and instructing him to determine the probable cause or causes of the steering casualty, based on such facts and symptoms, opposing petitioner did not even tell Mr. Tarabochia what these facts and symptoms were (R. 3017-3018, 3125-3126). Furthermore, he was not instructed to determine the cause of the casualty (R. 2983, 3125-3126). He was merely instructed to make a post-collision inspection of the steering gear and

to operate the gear in the presence of other surveyors. Such was the effect of his testimony.

Instead of establishing that the unseaworthiness of the steering gear was without the privity and knowledge of opposing petitioner, opposing petitioner's own witnesses furnished substantial evidence affirmatively showing such privity and knowledge. The Greek nationals selling the ship to opposing petitioner would not permit a thorough inspection of the vessel by representatives of the opposing petitioner prior to the closing of the sale (R. 2818-2819). Furthermore, opposing petitioner's representative (Mr. T. K. King), who went to Greece from West Germany to inspect the vessel for opposing petitioner, apparently was not an engineer (R. 2824, 2835). However, he wrote opposing petitioner that there were many conditions in the main engine room that were not up to standard (R. 2818-2819).

Opposing petitioner employed Bureau Veritas to survey the freighter prior to her purchase, but at the time of the survey the door to the steering engine room was locked (R. 2832). The first chief engineer on the freighter, upon arrival of the vessel in New Orleans, recommended to high officials of opposing petitioner that all auxiliary equipment for which the engineering department was responsible be completely broken down, inspected and overhauled (R. 2878, 2880). The reason for this recommendation was conditions found in the main engines and other equipment opened up in New Orleans (R. 2860). The company, solely in an effort to save money (R. 2860-2861), refused to permit such inspections, break-down and overhaul, and the evidence is to the effect that no reasonable inspection was ever made of the steering gear by opposing petitioner other than a cursory inspection by opposing petitioner's port en-

gineer in Taiwan. This particular inspection was of no significance because the port engineer stated that most of the time his back was to the steering engine gear, he being merely concerned with looking at the rams to see if the rudder was working properly (R. 2783-2784).

The evidence is to the effect that opposing petitioner knew (R. 2897-2899) that the vessel was consuming excessive amounts of telemotor oil, and this did or should have put opposing petitioner on notice that there was a leaky steering system and that the system was at least unseaworthy in that respect. That the freighter was probably not properly equipped with spare parts is shown by two things: (1) the fact that no spare part was located (Instead, the brush holder was repaired but not replaced before the casualty (R. 2639)) to replace the carbon brush holder in the starboard steering engine after the first steering casualty and before the second steering casualty that immediately preceded the collision; and (2) that there were no spare parts for the coils in the solenoids of the starter boxes, because wood blocks were used to close the circuits instead of replacing the coils. In all of these respects the steering gear was unseaworthy, with the knowledge and privity of opposing petitioner and as a result of the failure of opposing petitioner to exercise due diligence to make the vessel seaworthy. The District Court (affirmed by the Fifth Circuit) was clearly correct in its Finding 31 (R. 5133-5134 and pp. 19-20 of Appendix D of opposing petitioner's petition).

B. HER (THE FREIGHTER'S) MAIN ENGINES WERE UNSEAWORTHY

Finding 7 (R. 5122-5123 and opposing petitioner's petition at pp. 8-9 of Appendix D) is an excellent summary of

the voluminous, virtually undisputed evidence regarding the condition of the main engines of the freighter and the knowledge of such conditions by officers of opposing petitioner. Another summary is contained in the report and testimony of Mr. A. T. Spindanger (opposing petitioner's engineering expert) (See Pet. Ex. 25-J, R. 2863-2868). Opposing petitioner's delay in replacing piston heads was caused simply by its desire to save money (R. 2860-2861). As found by the courts, the effect of this condition of the main engines was to decrease the power of such engines for maneuvering purposes, and particularly affected stopping power under emergency circumstances. It is clear that this was negligence on the part of opposing petitioner directly contributing to the collision in that such deteriorated condition of the main propulsion machinery resulted in the failure of the freighter to stop as quickly as she otherwise could and should have.

C. HER (THE FREIGHTER'S) CAPTAIN AND CHIEF ENGINEER WERE NOT INSTRUCTED TO THE EFFECT THAT ALL FOUR OF HER MAIN ENGINES MIGHT BE COUPLED ASTERN

Contrary to opposing petitioner's statements contained in its petition to the effect that these officers had this knowledge, the weight of the evidence is to the contrary. While some of the answers to questions propounded to the master (R. 1618-1619 and 4794-4796) and to the chief engineer (R. 2212-2215) of the freighter were indirect, evasive and equivocal on this point, nevertheless, the clear import of all of their testimony was to the effect, and the District Court was thoroughly warranted in finding, that these officers did not know and had not been instructed by opposing petitioner that all four en-

gines could be coupled and running astern within less than a minute from any other position. Certainly there was no pre-arranged signal from bridge to engine room for this procedure, and it had never been done (R. 2341, 2349-2352). The master of the freighter testified that she traveled a half mile down the channel after her steering casualty (R. 1625). That she would have been able to stop sooner by using four engines astern rather than two engines is clear, and this was negligence of opposing petitioner contributing to the collision.

D. HER (THE FREIGHTER'S) TELEPHONE COMMUNICATION SYSTEM BETWEEN THE BRIDGE, ENGINE ROOM, STEERING ENGINE ROOM, ETC., WAS UNSEAWORTHY

Undisputed evidence was to the effect that when the emergency arose, communications between the bridge and the engine room and between the bridge and the steering engine room, etc., were accomplished by sending messengers about the ship rather than by using the sound powered phones (R. 1688-1689, 1532, 3837-3838). Such evidence was sufficient in and of itself to show that such phones were unseaworthy. In the exercise of due care, this deficiency was known to opposing petitioner, or should have been known to it. That the deficiency contributed to the collision is clear because had there been a direct means of phone communication among bridge, engine room, steering engine room, and after steering station, the nature of the steering failure could have been communicated to the bridge; the trick wheel in the steering room, or the wheel at the after steering station, could have been utilized; and the engine room could have been advised specifically of the need for all possible speed astern.

The foregoing having shown that the collision was caused by negligence of opposing petitioner, with "privity and knowledge", it is also true that the fire incidental to the collision, which caused the destruction of these respondents' cargo was caused by the "design or neglect" of opposing petitioner, it being clear even from the authorities cited by opposing petitioner that the two concepts are equivalent. Please see for instance the case of *Craig v. Continental Insurance Co.*, 141 U.S. 638 (1891). The collision having been caused by the "design or neglect" of opposing petitioner, it is likewise clear that opposing petitioner is not entitled to relief from liability for loss of these respondents' cargo under the Fire Statute (46 U.S.C.A., § 182). Therefore, opposing petitioner's suggested question 4 and its reason 3 for granting the writ are not a proper basis for granting a writ of certiorari.

COUNTER-ARGUMENT UNDER OPPOSING PETITIONER'S REASON 4

With all due respect, the argument of opposing petitioner appearing on pages 50-52 of its petition either answers itself or refers to the source of the answer in citing the case of *The City of Norwich*, 5 Fed. Cas., No. 2760 (D.C.N.Y. 1869). In that case, the only one known to these respondents on the point, Judge Benedict, a learned jurist in the Eastern District of New York, carefully considered the contention *in a collision case* that the Fire Statute (46 U.S.C.A. § 182) exonerated the shipowner when cargo was damaged by fire as a result of a collision. In holding that the Fire Statute afforded no defense to the shipowner under such facts, the court said:

> "But it is said that the goods in question were lost by the fire, and not by the collision, and that the fire

was accidental, and not the result of negligence. My opinion, however, is, that the fire must be considered to have been simply an incident of the collision, a natural result, almost sure to follow such a blow inflicted in certain places upon such a vessel as this steamer—a result which, in this instance, did follow the blow almost immediately and directly—and, as between the shippers and the ship, in law, a result of the negligence which brought the steamer in contact with the schooner.

"Indeed, the answer in the fourth article describes the fire as caused by the collision, and supposes it to be properly chargeable to the bad navigation of those on board the schooner.

* * *

"These views dispose of the argument, which was based upon the act of March 3, 1951. Assuming that this steamer was not excluded from the effect of the act by the seventh section—a question which has not been raised upon this argument—and assuming, also, that the act, although confined, in terms, to the owners, can be construed as applying also to the vessel—neither of which questions I here decide—it appears to be clear, that the first section of the act can have no application in a case where fire is but an incident of a collision. Losses by collision are provided for in a subsequent section, where, by the terms of the statute, the owners are made liable for such losses, to the extent of their interest in the vessel.

"My conclusion, accordingly, is, that these respective libellants are entitled to recover, of this steamer, the amount of the damages by them sustained by reason of the non-delivery of their goods. A decree will be, accordingly, entered, with orders of reference to ascertain and report the amount of such damages."

How it could make any real difference, as contended by opposing petitioner, that the fire in the case at bar spread to the freighter from fire on the tanker, rather than from fire originating in her own engine room as in the cited case, is difficult if not impossible to comprehend. These respondents firmly believe and contend that the distinction sought to be drawn is one without a difference and that the cited *City of Norwich* case, supra, properly settled the law contrary to opposing petitioner's contentions. No other case cited by opposing petitioner on the Fire Statute involved a collision.

From a factual standpoint, particularly in the Houston Ship Channel (one of the nation's leading arteries for the carriage of petroleum products), it is certainly as foreseeable as not that a meeting vessel will be carrying inflammables in her skin tanks and that burning liquids will be scattered throughout the area of any collision between vessels. Therefore, both from a legal and factual standpoint, the Fire Statute is no source of relief to opposing petitioner in its belated attempt to avoid liability for destruction of these respondents' cargo. As pointed out in the quoted language of Judge Benedict from the *City of Norwich* case, supra, Congress intended that shipowners' limitation of liability in collision cases should turn on 46 U.S.C.A. §183 (wherein liability for collision is expressly mentioned), rather than on the Fire Statute, 46 U.S.C.A. §182. Actually, the facts and authorities discussed by these respondents under the Counter-Argument Under Opposing Petitioner's Reason 3 above show clearly why no relief is available to opposing petitioner under either section in the case at bar, and certiorari should not be granted to review these questions.

COUNTER-ARGUMENT UNDER OPPOSING PETITIONER'S REASON 5

As suggested hereinbefore, in incorrectly asserting that the only negligence of the freighter was that of her officers and crew, opposing petitioner virtually concedes that where as here there are findings and substantial supporting evidence of causative negligence with privity and knowledge on the part of opposing petitioner itself, there is no issue for certiorari on the limitation of liability point. By reason of the facts and authorities discussed in these respondents' Counter-Argument Under Opposing Petitioner's Reason 3 above, opposing petitioner is most certainly not entitled to limit its liability for the loss of these respondents' cargo. Therefore, these respondents will not burden this Honorable Court by repeating such facts and authorities here.

CONCLUSION

While as set forth in these respondents' petition for certiorari heretofore filed in this case, these respondents contend and feel strongly that a writ of certiorari should issue from this Honorable Court to review the questions regarding the joint liability of the tanker and her owner in this consolidated case, nevertheless, further review is not merited on the questions of liability (or limitation of liability) of

the freighter, and therefore, as to those matters, should be denied.

Respectfully submitted,

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